

Year	Cost Per Pole	Dollar Increase Over Previous Cost	Percentage Increase Over Previous Cost	Total Yearly Pole Rental Cost	Cost Per Subscriber
1988	\$ 2.35	N/A	N/A	\$ 15,299	\$ 2.78
1990	\$ 6.00	\$ 3.65	155%	\$ 39,060	\$ 7.10
1995	\$ 9.50	\$ 3.50	58%	\$ 61,845	\$ 11.24
1996	\$12.00	\$ 2.50	26%	\$ 78,120	\$ 14.20
Proposed	\$25.00	\$13.00	108%	\$162,750	\$ 29.59
Total Increases:		\$22.65	964%	\$147,451	\$ 26.81

Despite already charging rates far above national averages, the Bangor utilities sought to further increase pole attachment rates to \$25.00.

Pole attachment costs are, of course, over and above Pine Tree's expenses for electric power and telephone service. With those additional utility costs, Pine Tree will pay \$239,650 per year for utility expenses, or 22 percent of its total operating expenses. This amount does not include the additional \$1,500 to \$2,500 per mile make-ready costs paid by Pine Tree.

- **Duncan Cable TV, Wilmington, Vermont** — Duncan Cable TV operates a small system in Wilmington, Vermont, serving 1,059 subscribers. Duncan Cable TV leases pole space from both power and telephone cooperatives. The following chart illustrates the most recent pole attachment rates paid by Duncan Cable TV:

Year	Power Cooperative Rate	Percentage Increase	Telephone Cooperative Rate	Percentage Increase
1991	\$3.60		--	
1992	--		3.60	
1995	\$8.60	139%	\$12.08	236%

In each case, the utilities dramatically and quickly increased Duncan's pole attachment rates. Duncan also pays significant make-ready costs over and above the specified rates.

- **ComSouth TeleCable, Perry, Georgia** — ComSouth Telecable serves roughly 5,600 subscribers in Perry, Georgia and surrounding areas. Comsouth's \$11.10 pole attachment rate paid to the local power cooperative increased to \$12.20 in 1995. ComSouth also pays the cooperative additional make-ready "certification" fees. By contrast, ComSouth pays \$5.11 per attachment to Georgia Power, with no additional make-ready fee.
- **Glass Antenna Systems, Inc., Fillmore, Indiana.** Glass Antenna Systems serves roughly 450 subscribers in Fillmore, Indiana. It leases pole space from two power cooperatives. One charges \$4.50 per pole. The other charges \$9.00 per pole. Due to its low subscriber density, Glass could not survive if it paid \$9.00 for all of its pole attachments.

Several SCBA members reported that some cooperatives may have an additional motivation for imposing high pole rates. Many cooperatives have become dealers for DBS operators, thereby giving the cooperatives a reason to increase the cost of their cable competition.

In addition to charging SCBA members rates well in excess of those charged by private companies, the power and telephone cooperatives leasing pole space to SCBA members often qualify for low-cost loans, subsidies and tax exemptions not available to other utilities. Despite

this, municipalities, cooperatives and other pole owners around the country seek additional pole attachment rate increases. For example, in 1996, the City of Seattle increased its pole attachment rate from \$6.24 per city-owned pole (the rate was \$3.12 for poles owned jointly by the city and U.S. West) to \$14.56 per pole, a rate comparable to that reported by some SCBA members.<sup>40</sup> TCI reports that the city's proposed rates "are among the highest in the country—2.7 times the national average for all utilities, and 3.5 times the average for utilities that follow the FCC pole attachment rate formula."<sup>41</sup>

The recent pole attachment rate proceedings in the state of Michigan further illustrate the importance of reasonable constraints upon pole attachment rates. There, Michigan's two largest regulated utilities sought dramatic pole attachment rate increases. One utility sought pole attachment rate increases to \$33.61 per pole. The MPSC not only rejected the proposed rate increases, but decreased state-wide pole attachment rates to \$3.74 per pole from \$4.95 per pole.

The MPSC applied a methodology consistent with Commission's pole attachment regulations and Michigan's own Telecommunications Act. The Michigan experience highlights the need for reasonable pole attachment rate oversight. The Commission's pole attachment rate methodology creates a zone of reasonableness bounded at the upper end by the fully-allocated costs of providing cable operators pole attachment space.<sup>42</sup> The § 224(a)(1) exemption for rural cooperatives and municipalities removes all boundaries on reasonable pole attachment rates. Consequently, small cable typically pays pole attachment rates far in excess of the upper limits

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<sup>40</sup> *The Seattle Times*, 1/17/97 Final Edition, p. B3.

<sup>41</sup> *Id.*

<sup>42</sup> *Memorandum Opinion and Second Report and Order*, 72 FCC 2nd 59 (rel. 5/23/79), ¶ 8.

established by Commission regulations. Small cable and its subscribers cannot afford to pay such excessive pole attachment fees. SCBA strongly urges the Commission to report to Congress the need to revoke the cooperative exemption contained in 47 USC § 224(a)(1).

## **VI. CONCLUSION**

Small cable faces a number of challenges that require modification of Commission regulations and statutory provisions. SCBA has outlined the need for changes to the program access provisions in light of continued consolidation amongst programmers and DBS providers. SCBA urges the Commission to modify the program access rules and to report to Congress the need for more comprehensive changes as well. SCBA also urges the Commission to request Congressional action to remove the pole attachment rate regulation exemption in light of the serious and widespread abuses SCBA members have witnessed.

Respectfully submitted,

**SMALL CABLE BUSINESS ASSOCIATION**

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## CERTIFICATE OF SERVICE

I, Carol L. Malmud, a secretary at the law firm of Howard & Howard, do hereby certify that a copy of the foregoing "Comments of the Small Cable Business Association" was sent via first class mail, postage prepaid to the following persons, this 23rd day of July, 1997.

The Honorable Reed E. Hundt  
Chairman  
Federal Communications Commission  
1919 M Street, NW, Room 814  
Washington, DC 20554

The Honorable Rachelle B. Chong  
Commissioner  
Federal Communications Commission  
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The Honorable James H. Quello  
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Federal Communications Commission  
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Carol L. Malmud

# **EXHIBIT A**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

Implementation of Section 25 of the	)	
Cable Television Consumer Protection and	)	MM Docket No. 93-25
Competition Act of 1992,	)	
Direct Broadcast Satellite Service Obligations	)	

**COMMENTS OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

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April 28, 1997

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## **SUMMARY**

During the four years that judicial challenges delayed this rulemaking, the DBS industry has transformed itself from a "fledgling industry" offering few channels to few subscribers, to one backed by media giants and currently offering hundreds of channels to over 4 million customers. Sounds great, doesn't it? Not really. There's a crack in the federal policy dam. When the dam gives way, local programming as we know it will no longer exist. The impact will hit rural America -- mostly served by small cable -- the hardest.

### **DBS Harms Local Programming**

DBS offers a generic national broadcasting service that does not require the infrastructure or incur the regulatory costs associated with providing local programming services. Every customer DBS claims reduces broadcast viewership and possibly cable viewership. Continued erosion of broadcast viewership will threaten the financial viability of "free TV" relied on by 35% of all Americans. It will also remove a significant source of local programming carried on cable.

The loss of local programming sources will eliminate sources of critical information to community residents, including:

- Local news
- Local sports
- Local public affairs
- Local emergency notification
- Public, education and government access
- Local business advertising
- Local political advertising

Congress and the Commission have formed communications policy around the principle of localism for the past 63 years. Congress recently reaffirmed the importance of local programming and ordered the Commission to regulate DBS to prevent it from harming localism.

### **Establish Regulatory and Financial Parity**

SCBA presents a plan to establish regulatory and financial parity in a way that helps preserve local programming. By leveling the competitive playing field, the Commission will pave the way for long-term competition. Without parity, the cost savings that DBS providers enjoy by avoiding local programming obligations will allow them to continue competing unfairly, placing providers of local programming at substantial risk.

### **Program Regulation Parity**

The Commission must establish parity in the regulation of program carriage. The cornerstone of these regulations, must-carry, must apply to DBS as well. DBS providers do not have a unified position regarding local signal carriage. At best, one provider might carry some signals in some communities. At worst, another provider might not carry any local signals. Even where carried, DBS providers will likely seek compensation from broadcasters, offsetting any financial benefit the stations should receive from mandatory carriage. In addition to must-carry, the Commission must extend all other program carriage restrictions to DBS, including distant signal importation limits and sports blackout provisions.

SCBA recognizes that DBS providers cannot implement must-carry overnight. Some announced plans will take years, if not longer. Regardless of the timelines, DBS' harm to local programming increases every day. The Commission needs a must-carry plan that accommodates this reality while helping local programming today. SCBA suggests that the Commission allow DBS providers to opt-out of the must-carry requirements in any market so long as they contribute a percentage of gross revenues received from subscribers in that market into a national fund designed

to support local programming efforts. Payments to this fund would offset the harm inflicted by DBS' failure to carry local programming.

### **Financial Parity**

The Commission must also create regulatory parity with respect to the financial burdens imposed on small cable as a result of maintaining a distribution facility capable of delivering local programming. DBS providers, even after including spectrum fees, require only 10 percent of the initial capital investment of small cable -- the difference being that small cables' systems must have the capability to deliver local programming. Congress recently faced a similar issue when it imposed federal requirement on open video system ("OVS") to make payments equal to those of incumbent cable operators -- even though incumbent local exchange carriers argued their preexisting rights to occupy the streets and rights-of-ways. The Commission, under its mandate and authorization to prevent harm to localism, should require DBS providers to make the following payments:

- ◆ **Surrogate for franchise fees** - Five percent of gross paid to either local governments or to a local programming support fund.
- ◆ **PEG funding** - A national average per subscriber amount contributed to either local governments, PEG access groups or a local programming support fund.
- ◆ **Other franchise costs** - A national average per subscriber amount contributed to either local governments or a local programming support fund.
- ◆ **Local property tax** - An equivalent amount paid to local governments.

### **Enforceable Parity**

SCBA members have evidence of widespread violations of current broadcast signal carriage prohibitions. SCBA members have little opportunity to enforce these violations. The Commission

must give any aggrieved party, including small cable, the right to seek redress. To give the provisions teeth, the enforcement provisions should allow recovery of significant statutory damages and attorneys fees.

SCBA asks the Commission to take action to impose significant regulation on relatively new providers of multi-channel video programming services. DBS has about the same number of subscribers that cable did when the Commission imposed significant regulation, including must-carry requirements, in 1965. SCBA's proposal allows the development of fair competition without government providing advantages to any provider. This represents the only playing field where competition can exist in the long-term.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Implementation of Section 25 of the	)	
Cable Television Consumer Protection and	)	MM Docket No. 93-25
Competition Act of 1992,	)	
Direct Broadcast Satellite Service Obligations	)	

**COMMENTS OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

**I. INTRODUCTION**

The Commission's inquiry to determine the public interest obligations of direct broadcast satellite ("DBS") providers seeks to satisfy two distinct components of public interest: (1) general public interest; and (2) local public interest referred to as "localism." The focal point of localism is local programming. DBS providers have the greatest impact on local programming in less densely populated areas -- areas most frequently served by small cable. The Small Cable Business Association ("SCBA") focuses these comments on local programming concerns.

Formed nearly four years ago, SCBA today represents almost 300 small cable operators, most of whom have 1,000 or fewer subscribers. SCBA began as small operators banded together to cope with the regulatory burdens imposed by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Today, SCBA remains active in many Commission rulemakings, ensuring that the Commission understands the unique impact its regulations have on small cable and customers of small cable.

## **II. UNFETTERED GROWTH AND DEPLOYMENT OF DBS THREATENS THE VIABILITY OF LOCAL PROGRAMMING, ESPECIALLY IN RURAL AMERICA.**

### **A. The Commission has a Statutory Duty to Protect Localism from DBS Inflicted Harm.**

#### **1. The Commission has a statutory duty to protect and promote local programming.**

The Commission must draw an important distinction between imposing local programming obligations on a multi-channel video programming provider and acting to preserve and foster local programming. The Commission has declared the former as optional.<sup>1</sup> In all cases, however, the latter has always been mandatory. As discussed below, Congress clarified matters by mandating that the Commission regulate DBS's impact on localism.

#### **a. Section 307(b) of the Communications Act requires the Commission to promote localism.**

Congress first mandated localism in 1934 as part of the Communications Act of 1934:

The Commission shall make such distribution of licenses . . . among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same.<sup>2</sup>

Under this general mandate, the Commission previously declared that it had the authority to authorize a national broadcasting service such as DBS that was exempt from any local programming or ownership requirements.<sup>3</sup>

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<sup>1</sup>*Report and Order*, Direct Broadcast Satellites, 90 FCC 2d 676 (1982) (the Commission determined that it had the authority to authorize a nonlocal broadcast service without violating its statutory mandate to foster localism).

<sup>2</sup>47 U.S.C. § 307(b).

<sup>3</sup>*Report and Order*, Direct Broadcast Satellites, 90 FCC 2d 676 at 686 (1982).

**b. The 1992 cable act mandates protection of localism from DBS.**

Congress directed the Commission either to enact rules that require the carriage of local programming on DBS or, in the alternative, regulate DBS to protect local programming from the siphoning of viewers by DBS:

The Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding. . . . Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.<sup>4</sup>

The Commission concisely, but not completely, articulated the task Congress placed before it:

[W]e interpret Congress' directive to be that we consider whether a national mode of programming service such as DBS can accomplish the long standing goal of service to individual communities.<sup>5</sup>

This interpretation misses a key point by ignoring the clause on the other side of the conjunction "or." In addition to requiring the Commission's examination of how DBS can advance localism, it also requires the Commission to regulate DBS providers to the extent necessary to protect localism. The following excerpt illustrates the portion of the mandate omitted from the Commission's analysis:

Such proceeding shall examine the methods by which such principle [localism] may be served through . . . regulation of. . . such [DBS] service.<sup>6</sup>

This is the only construction of the Congressional mandate that does not render the clause "or regulation of" superfluous.

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<sup>4</sup>47 U.S.C. § 335(a).

<sup>5</sup>8 FCC Rcd 1589 at 1595 (1993).

<sup>6</sup>47 U.S.C. § 335(a).



The Congressional mandate requires the Commission to either impose on DBS providers obligations to provide local programming or, if DBS does not provide local programming, to restrict DBS in order to protect local programming. Because some DBS operators will provide no local programming in any market<sup>7</sup> and others may provide some local programming in some markets,<sup>8</sup> the Commission must impose restrictions on DBS providers to preserve existing local programming outlets. Congress gave the Commission a broad grant of authority to craft such regulations.

**2. Both the Commission and Congress have Acted to Preserve Localism.**

**a. The Commission has woven the principle of localism throughout its regulatory scheme.**

Localism has served as the cornerstone of communications policy and regulation for the last 63 years. The Commission has acted aggressively during this period to reign in fast growing new media in order to promote and preserve localism. A brief review of the extensive precedent helps put the issue in perspective.

- ◆ **Chain Broadcasting Rules.** In 1941, as network programmers gained increasing control over the programming of their affiliates, the Commission acted to severely restrict the terms that networks could demand in their affiliation agreements.<sup>9</sup> By limiting network influence on programming, the Commission effectively returned program control to the hands of local management. At the time, this represented a

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<sup>7</sup>Testimony of Stanley Hubbard, President and CEO, Hubbard Broadcasting, Transcript of Hearings before the Senate Committee on Communications, Science and Technology, April 10, 1997 ("Hearing Transcript") at 24.

<sup>8</sup>Testimony of Rupert Murdoch, CEO, The News Corporation, Hearings Transcript at 9.

<sup>9</sup>*Report on Chain Broadcasting*, Commission Order No. 37, Dkt. 5060 (May 1941).

bold action as radio networks had greatly fostered the growth and development of the radio broadcasting industry.

- ◆ **Broadcast License Distribution.** In 1952, the Commission developed a table of assignments that reserved frequencies in 1,274 communities, ensuring that each would have the spectrum available for at least one local broadcast station. The Commission believed that this “protects the interests of the public residing in smaller cities and rural areas more adequately than any other system for distribution of service . . . .”<sup>10</sup>
- ◆ **Local Origination.** In 1969, the Commission initiated a rule requiring large television operators to originate a significant amount of local programming to both ensure diversity of views and also to satisfy local programming needs.<sup>11</sup>
- ◆ **Must-Carry Rules.** The Commission first imposed a mandate to carry local broadcast signals in 1965 – at a time when cable was only seven years old and served only 5 million subscribers.<sup>12</sup> The Commission justified its actions as necessary to ensure the financial viability of broadcast programming. The Commission attempted to enforce mandatory carriage over the ensuing 30 years despite successful court challenges to its Constitutional validity.
- ◆ **Distant Signal Importation Limits.** The Commission has also limited a cable operator’s ability to import signals from other markets that might compete with local broadcast signals. In 1972, the Commission created market quota rules through the

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<sup>10</sup>*Sixth Report and Order*, 41 FCC 148 (1952).

<sup>11</sup>*First Report and Order*, 20 FCC 2d 201 (1969).

<sup>12</sup>Testimony of Amos Hostettler, CEO, Continental Cablevision, Hearing Transcript at 6.

may-carry rules.<sup>13</sup> Under those rules, operators could only import a certain number of distant signals. The Commission currently maintains restrictions prohibiting the importation of duplicative network programming (network non-duplication rules) and similar rules governing syndicated programming (syndicated exclusivity rules).

**b. Congress has recently acted to perpetuate localism.**

As recently as 1992, Congress passed legislation squarely aimed at preserving localism:

- ◆ **Must-Carry.** Congress, relying on the need to preserve localism in television broadcasting, mandated cable carriage of local broadcast signals:<sup>14</sup>

A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.<sup>15</sup>

- ◆ **DBS Localism Rulemaking.** As discussed fully above, Congress has mandated that the Commission, through either affirmative obligations or other regulation, ensure that DBS fosters, or at a minimum does not harm, localism.<sup>16</sup>

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<sup>13</sup>*Cable Television Report*, FCC 72-108 (1972).

<sup>14</sup>47 U.S.C. §§ 534 and 535.

<sup>15</sup>1992 Cable Act at § 2(a)(10) and (11).

<sup>16</sup>47 U.S.C. § 335(a).

**B. Continued growth of DBS threatens to destroy vital local programming sources.**

**1. Escaping local programming obligations has allowed DBS explosive growth.**

In the four short years since the Commission last considered imposing regulations on DBS providers, the profile of the DBS industry has changed significantly. In the 1993 *NPRM*,<sup>17</sup> the Commission refused to place requirements or restrictions on DBS to protect localism, citing an experimental industry in its infancy:

Our tentative view, however, is that if a local DBS service is not technically and economically feasible, other regulations should not be considered in this area given that DBS is a fledgling industry and that there is an abundance of local broadcast stations and cable television systems that are already serving local needs.<sup>18</sup>

Today, the Commission finds an industry experiencing explosive growth, offering large numbers of channels and backed by major media companies:

- ◆ **Explosive subscriber growth.** The Commission reported almost 4 million DBS subscribers as of October 1996, with at least one service growing by as much as 140,000 subscribers a month.<sup>19</sup> The Commission has noted that "DBS services have grown at a rate making DBS receiving equipment one of the most successful new consumer electronics product introductions in history in terms of units sold."<sup>20</sup>

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<sup>17</sup>*Notice of Proposed Rulemaking*, MM Docket No. 93-25 (released March 2, 1993) 8 FCC Rcd 1589 ("*NPRM*").

<sup>18</sup>8 FCC Rcd 1589 at 1596 (1993).

<sup>19</sup>*Third Annual Report*, In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 63-133 (released January 2, 1997) ("*1996 Competition Report*") at Appendix C, Tables 1 and 2.

<sup>20</sup>*Id.* at ¶ 40.

- ◆ **Vast expansion of channel offerings.** Since releasing the *NPRM*, at least one DBS provider has increased its channel offerings by almost 900%. In 1993, the Commission noted that Primestar offered 11 channels of programming.<sup>21</sup> In 1997, the Commission noted that Primestar provided 95 channels, with plans to expand to 150 channels.<sup>22</sup> Other DBS providers also offer a large number of channels:

DBS Provider	Number of Channels Offered <sup>23</sup>
DIRECTV/USSB	200
Primestar	95 (plans to expand to 150)
EchoStar	Over 100
American Sky Broadcasting ("ASkyB")	150 planned

These channel totals illustrate that DBS has progressed far beyond an experimental service. With the proposed merger of EchoStar and ASkyB, a new class of DBS provider will be born before the end of this year. Occupying two full orbital slots with the capability of delivering 250 or more channels, DBS has become a formidable competitor to cable, especially small cable that must invest significant capital to construct and maintain the infrastructure necessary to deliver local programming to subscribers in rural America.

- ◆ **Large Media Companies Backing DBS.** The participation of several large cable MSOs in Primestar is dwarfed by the entry of ASkyB's owner, media giant The News Corporation, and

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<sup>21</sup>8 FCC Rcd 1589 at 1591, n.14.

<sup>22</sup>1996 *Competition Report* at ¶ 41.

<sup>23</sup>1996 *Competition Report* at ¶ 41.

its partner MCI Communications. This merger will consolidate two full orbital slots in a major media company with staggering financial and programming resources. DBS has moved well beyond the "fledgling industry" that the Commission recommended not regulating four years ago.<sup>24</sup>

**2. One DBS provider seeks to eliminate cable and the local programming it provides.**

The CEO of ASkyB, Preston Padden, has publicly stated his intent to drive cable from the competitive landscape. He has warned that "the cable guys will have to be calling for Dr. Kevorkian."<sup>25</sup> This declaration evidences that the most formidable DBS provider seeks not to merely compete with traditional cable, but to replace it and become the exclusive provider of multichannel video programming services. This task may prove challenging against large MSOs in large urban markets. EchoStar/ASkyB may find the task much easier in smaller markets.

Local programmers in smaller markets are more vulnerable due to their higher cost of delivering programming. Small cable has made significant capital investment in plant and equipment and incurs the higher cost necessary to make possible the delivery of local signals to more rural, less densely populated areas.<sup>26</sup> DBS has not incurred such significant capital investments to serve rural areas. The following chart shows the disparities:

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<sup>24</sup>NPRM at ¶ 36.

<sup>25</sup>*Sky Vows Air War on Cable: Murdoch's \$1 Billion Deal*, Electronic Media, March 3, 1997 at 1.

<sup>26</sup>*Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215 (released June 5, 1995) ("*Small Systems Order*") at ¶ 56.

DBS

\$87.50<sup>27</sup>

Small Cable

\$750 - \$1,500<sup>28</sup>

Small cable provides multi-channel video programming services with local content in areas of the United States typically ignored by others. The Commission's analysis must consider that this makes small cable unusually susceptible to challenges by generic national programming delivered by those without any duty, intent or ability to offer local programming as an integrated component of their service in all markets.<sup>29</sup>

**3. Local programming in smaller markets.**

**a. Types of local programming at risk.**

Due in large part to the Commission's efforts to foster localism, residents of this Country enjoy the benefits of a large variety of local programming. They include:

**(1) Local news**

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<sup>27</sup>Prepared Testimony of Rupert Murdoch before the Senate Committee on Commerce, Science and Transportation ("Prepared Testimony") reports total initial capital investment of \$700 million with a target of 8 million customers within 5 years.

<sup>28</sup>This represents the average cost of small cable aerial plant construction divided by average rural densities. Because the rural densities can range widely, the cost per subscriber can widely vary. In all cases, however, the capital investment of a small operator significantly exceeds that of a DBS provider.

<sup>29</sup>DBS providers do not have a consistent plan for delivery of local programming. Mr. Hubbard has testified to Congress that "I can tell you we're not going to follow suit and we and DIRECTV are not going to present local stations." Hearing Transcript at 24. EchoStar/ASkyB, on the other hand has presented different stories. Initially, its executives stated the intent to provide local programming to 75% of television households. *News Corp., EchoStar Woo TV Stations*, Multichannel News, March 17, 1997 at 5, citing ASkyB CEO Preston Padden. Less than a month later, Mr. Murdoch testified to the Congress that EchoStar/ASkyB would use alternate technology to provide local programming in all markets. Hearing Testimony at 9. Mr. Murdoch made it clear, however, that his service would not carry all local stations.

- (2) Local sports
- (3) Local public affairs and political interest
- (4) Local emergency notification
- (5) Public, education and government ("PEG") access
- (6) Local business advertising
- (7) Local political advertising (election campaigns)

**b. Types of local program providers at risk.**

These types of local programming cannot continue without those who produce and distribute the programming. The prospect of continued and increasing unfair competition from DBS, a provider that escapes all local public interest obligations, threatens to eliminate these sources of local programming.

**(1) Off-air broadcasters.**

For the past 32 years, the Commission has vigorously asserted that local off-air broadcast stations cannot survive without guaranteed carriage on cable. The Commission's first attempt reaches back to 1965 when cable had only 5 million subscribers nationally.<sup>30</sup> In recent years, broadcast station revenues continued to decline<sup>31</sup> as the courts repeatedly struck down the

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<sup>30</sup>*Turner Broadcasting System, Inc. v. Federal Communications Commission*, No. 95-992, slip op. at 57 (March 31, 1997).

<sup>31</sup>Broadcast advertising revenues declined in real terms by 11 percent between 1986 and 1991. *Turner* slip op. at 57.



Commission's efforts to craft an enforceable carriage requirement and as viewers have had increased access to multi-channel video options.<sup>32</sup>

Congress intervened to protect local broadcasters by mandating carriage as part of the 1992 Cable Act. Congressional findings of the harm and the risk of the financial collapse of even a few broadcasters mandated the imposition of significant signal carriage requirements:

A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.<sup>33</sup>

Congress also reiterated the critical importance of maintaining the viability of "free TV" and its ability to create local programming. Congress found that if not carried by cable:

[T]he economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.<sup>34</sup>

In defending the must-carry statute against the First Amendment challenge, the government:

"downplays the importance of showing a risk to the broadcast industry as a whole and suggests the loss of even a few broadcast stations "is a matter of critical importance."<sup>35</sup>

In upholding the must-carry statute, the Supreme Court validated the government's two key considerations:

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<sup>32</sup>Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") at § 2(a)(13).

<sup>33</sup>1992 Cable Act at § 2(a)(10) and (11).

<sup>34</sup>*Id.* at § 2(a)(16).

<sup>35</sup>*Turner*, slip op. at 18.